Supreme Court, U.S.
FILED
MAR 12 2010
OFFICE OF THE CLERK

No. 09-678

In the Supreme Court of the United States

PATRICIA SIMON AND JOHN SIMON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The postal-matter exception to the Federal Tort Claims Act, 28 U.S.C. 2680(b), preserves the government's sovereign immunity for "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." The question presented is whether this provision encompasses petitioners' claim that their shipment of postal matter was stolen from the Postal Service, was never recovered, and was thus never delivered to its intended recipient.

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OPINIONS BELOW

The judgment of the court of appeals (Pet. App. 2a-3a) is unreported. The order of dismissal by the district court (Pet. App. 1a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2a-3a) was entered on September 11, 2009. The petition for a writ of certiorari was filed on December 10, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Subject to a number of important limitations, the Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States by conferring federal-court jurisdiction over tort cases alleging negligence or

wrongful acts committed by federal employees in the course of their employment. 28 U.S.C. 1346(b)(1). As to claims falling within this jurisdictional grant, the FTCA generally makes the United States liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674.

There are 13 categories of exempted claims under the FTCA. 28 U.S.C. 2680. The exemption at issue in this case pertains to postal operations and provides that "[t]he provisions of this chapter and section 1346(b) of this title shall not apply to * * * [a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. 2680(b).

2. Petitioners in this case deposited the cremation ashes of their mother with the United States Postal Service (USPS) for delivery to a mortuary. Pet. App. 2a. Petitioners did not have the option of purchasing insurance for the shipment. *Ibid.* Subsequently, the ashes apparently were stolen from a loading area of the post office. *Ibid.* The ashes were never found, and were not delivered to their intended destination.

Petitioners filed with the Postal Service an administrative claim under the FTCA. See 28 U.S.C. 2675. The Postal Service denied the claim based on the statute's postal-matter exception, 28 U.S.C. 2680(b). See Pet. App. 2a.

Petitioners then filed this FTCA action in federal district court. The district court granted the government's motion to dismiss petitioners' action. Pet. App. 1a.

Petitioners appealed the dismissal, contending that the postal-matter exception was inapplicable because they had been denied the opportunity to buy insurance and that the conduct of the USPS exceeded mere negli-

gence, "rising to the level of gross negligence." Pet. App. 2a-3a. The court of appeals affirmed. The court reasoned that "[t]he allusion to insurance and registration in *Dolan v. U.S. Postal Service*, 546 U.S. 481, 490 (2006) ('losses of the type for which immunity is retained under § 2680(b) are at least to some degree avoidable or compensable through postal registration and insurance') does not affirmatively condition the application of the postal matters exception on the availability of insurance." Pet. App. 3a. The court of appeals further determined that petitioners' "gross-negligence theory is foreclosed by controlling precedent, to which this panel must adhere." *Ibid.* (citing *Levasseur* v. *USPS*, 543 F.3d 23 (1st Cir. 2008)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners' claim fits squarely within the postal-matter exception to the FTCA. That exception provides that the FTCA's waiver of sovereign immunity "shall not apply to * * * [a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter." 28 U.S.C. 2680(b). Here, the theft of petitioners' package resulted in "loss," see *C.D. of NYC, Inc.* v. *USPS*, 157 Fed. Appx. 428, 429 (2d Cir. 2005), cert. denied, 549 U.S. 809 (2006); *Georgacarakos* v. *United States*, 420 F.3d 1185, 1188 (10th Cir. 2005), and thus falls under the plain language of the statute. Indeed, the loss of petitioners' shipment is quintessentially the kind of loss for which the postal-matter exception was created. As this Court explained in *Dolan* v. *USPS*, 546 U.S. 481 (2006), "Congress intended to retain immunity,

as a general rule, only for injuries arising, directly or consequentially, because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address." *Id.* at 489. Here, petitioners seek to recover because the package mailed on their behalf "fail[ed] to arrive at all," *ibid.*, and their claim therefore is barred.

2. Petitioners nevertheless contend (Pet. 10-14) that the postal-matter exception does not extend to their claim of gross negligence and that the court of appeals decision to the contrary conflicts with this Court's decision in *Dolan* and the Second Circuit's decision in *Birnbaum* v. *United States*, 588 F.2d 319 (1978). That argument is without merit.

In *Dolan*, this Court construed the phrase "negligent transmission" to encompass injuries of the type comprehended by the terms "loss" and "miscarriage" that precede it in the statutory exception, and thereby to exclude injuries resulting from tripping over a package that was placed by a Postal Service employee at its destination. 546 U.S. at 486. Petitioners argue (Pet. 13-14) that just as the *Dolan* Court limited the scope of "negligent transmission" to the types of injuries covered by "loss" and "miscarriage," so too should the standard of care applied to "loss" and "miscarriage" be limited to that which applies to "transmission"—namely negligence. The *Dolan* Court was engaged in the well-established practice of construing an ambiguous term in a statute (transmission) by looking to the surrounding words. See, *e.g.*, *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (noting that an ambiguous term "gathers meaning from the words around it"). However, petitioners do not seek to clarify an ambiguous term. Rather, they advocate reading a legal element (negligent) into the postal-matter exception that is not contained in the

statute for "loss" and "miscarriage." This Court "ordinarily resist[s] reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997).

Contrary to petitioners' contention, in fact, the statutory language is inconsistent with petitioners' interpretation. If Congress had wanted "negligent" to apply to all three terms in the exception, presumably it would have placed the adjective in front of those terms so as to read "any claim arising out of the [*negligent*] loss, miscarriage, or [] transmission of letters or postal matter." But Congress did not do so. Instead, it placed "negligent" immediately in front of "transmission" so as to modify only that term. Thus, basic rules of grammar foreclose petitioners' argument. See *Department of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 129 n.2, 131 (2002) (observing that the Ninth Circuit's holding that "under the tenant's control" in the phrase, "any member of the household, a guest, or another person under the tenant's control," modifies not just "another person," but also "member of the household" and "guest," "runs counter to basic rules of grammar").

Petitioners' contention (Pet. 10) that the Second Circuit's 1978 decision in *Birnbaum* interpreted the postal-matter exception to include only negligence torts is equally unavailing. A similar claim was persuasively rejected in *Levasseur* v. *USPS*, 543 F.3d 23 (1st Cir. 2008), on which the court below relied. As *Levasseur* explained, the court's comment in *Birnbaum* that "[t]he language of the exception itself indicates that it was not aimed to encompass intentional acts," 588 F.2d at 328, referred only to the "negligent transmission" element and not to "loss" or "miscarriage." See *Levasseur*, 543 F.3d at 24. Had the *Birnbaum* court's remark extended

to "loss" and "miscarriage," it would have conflicted with that circuit's decision in *Marine Ins. Co.* v. *United States*, 378 F.2d 812 (2d Cir.), cert. denied, 389 U.S. 953 (1967), which held that "the § 2680(b) exception applied to the *theft* of postal matter by a governmental employee" (emphasis added).[1] *Levasseur*, 543 F.3d at 24. Theft, of course, is an intentional tort.

3. Nor is there any merit to petitioners' contention that the postal-matter exception applies only to claims for which insurance is available. Pet. 14-15. In support of their argument, petitioners cite (*ibid.*) the Court's observation in *Dolan* that "losses of the type for which immunity is retained under § 2680(b) are *at least to some degree* avoidable or compensable through postal registration and insurance." 546 U.S. at 490 (emphasis added). That language cannot bear the weight of petitioners' argument. The Court noted that the existence of postal insurance lends "[f]urther support[]," *ibid.*, to its interpretation of the statute. It did not hold that application of the postal-matter exception is conditioned upon the availability of insurance for the particular postal matter in question, and nothing in the text of Section 2680(b) supports such a limitation. Indeed, that argument is foreclosed by the plain language of the statute, which explicitly covers letters, 28 U.S.C. 2680(b), despite the fact that letters are ineligible for postal insurance, USPS, *Mailing Standards of the United States Postal Service: Domestic Mail Manual* § 503.4.2.3(f) (Feb. 1, 2010).[2]

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[1] *Levasseur* further noted that "[s]ince *Birnbaum* did not involve a loss, the remark in question also would have been dicta if it was meant to apply thereto." 543 F.3d at 24.

[2] Petitioners also cite (Pet. 15) dicta in *MB Financial Group, Inc.* v. *USPS*, 545 F.3d 814 (9th Cir. 2008) (*MB*), noting *Dolan*'s approval of

Petitioner's interpretation would greatly undermine the postal-matter exception. There are countless items sent through the mail that have no actual, insurable value, but have great personal or emotional value. Certainly Congress did not contemplate exclusion of such items from the postal-matter exception. Indeed, *Dolan* characterized such items as "[i]llustrative instances of the exception's operation" when it noted that the exception applies to "personal or financial harms arising from nondelivery or late delivery of sensitive materials or information (*e.g.*, medicines or a mortgage foreclosure notice)." 546 U.S. at 489.

To be sure, in some circumstances, insurability by the Postal Service may indicate that the loss is covered by the exception, but it is not determinative. Here, the type of tort alleged by petitioners is ordinarily one that could be protected by insurance, but petitioners were unable to insure against the injury they suffered because the value they attached to their package was of a sort that could not readily be insured. In other words, the unavailability of insurance was due to the type of injury that petitioners suffered, not the type of tort they alleged.

"focus[ing] on whether the plaintiff could insure against the harm of which she complained." *Id.* at 818. *MB* involved potential government liability for failure to make available a post office box that the Postal Service was purportedly obliged to provide for the plaintiff's business mail (specifically, failure to properly process the renewal of the box.) The court held that the case did not arise out of the "negligent transmission" of mail. It reasoned that "*Dolan* may also be read as distinguishing between the historically governmental service of carrying the United States mail and the performance of acts that may be related to delivery, but constitute more ordinary activities that private actors engage in as well." *Id.* at 817.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2010